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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 111

GLEN H. TAYLOR,
Petitioner

vs.

CITY OF BIRMINGHAM, ALABAMA,
Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OPINION OF THE COURT BELOW

The opinion of the Court of Appeals of Alabama is officially reported at 45 So. 2d 53 and is set out in the record herein (R. 201). The opinion of the Supreme Court of Alabama denying certiorari is officially reported at 45 So. 2d 60 and is set out in the record herein (R. 211).

STATEMENT OF THE CASE

Through inaccuracies and omissions in the "Summary Statement of the Matter Involved" and "The Facts," as contained in the petition for writ of certiorari, the impression may have arisen that the petitioner was prosecuted and

convicted in the State Courts of disorderly conduct for attempting to enter a church where a meeting was being held through a door marked "Negro entrance." The record reveals that any such impression is completely erroneous. The record, as we will demonstrate hereinafter, shows clearly and unequivocally that the petitioner, upon reaching the church where the meeting was in progress, committed an assault and battery upon a uniformed police officer of the City of Birmingham, thereby committing a breach of the peace, and that petitioner's prosecution and conviction of disorderly conduct was based upon this activity and conduct of petitioner, as well as upon his using profane language and drawing his fist back as if to strike other police officers. We shall demonstrate that the record is clear that the prosecution of petitioner was neither in form nor in fact an attempt to enforce the segregation ordinance of the City of Birmingham against petitioner.

The petitioner arrived at the Terminal Station in Birmingham on the morning of May 1, 1948 (R. 65), and was there interviewed by a newspaper reporter (R. 65). Upon being asked by the reporter if he knew that the police commissioner of Birmingham might have him arrested if he violated the segregation law, the petitioner replied "The police commissioner can go to hell" (R. 66). The petitioner admitted on the stand that the interview occurred substantially as the newspaper reporter had testified (R. 185, 186).

On the same day, May 1st, at about 10:30 A. M., a representative of petitioner appeared at the office of the police commissioner of Birmingham and orally requested the police commissioner to furnish petitioner adequate police protection (R. 171), and at 11:05 A. M., of the same day, he confirmed his oral request for police protection by a telegram to the police commissioner in which he repeated that request and asked specifically for two officers during petitioner's "twenty-four hour stay in Birmingham" (R. 172).

The police commissioner ordered the Chief of Police to furnish appellant "plenty of police protection" (R. 172).

Petitioner arrived at the church where a meeting of the Southern Negro Youth Congress was being held at about 9:00 P. M. on May 1st (R. 92). The church had one entrance on the Seventh Avenue side of the building and another entrance on the 16th Street side of the building (R. 61). Also, see photograph of the church (R. 37, 38). The entrance on the Seventh Avenue side was marked with a sign reading "colored entrance" and the entrance on the 16th Street side was marked with a sign reading "white entrance" (R. 43). The record is clear that the entrance marked "white entrance" was not "at the rear of the building," as stated in petitioner's brief at page 4, but that such entrance was on the side of the building (R. 63). There was a sidewalk on the 16th Street side of the church just as there was on the Seventh Avenue side (R. 61). These sidewalks clearly appear in the photograph of the church (R. 37, 38). The entrance marked "white entrance" on the 16th Street side was nearer to the sidewalk than was the entrance marked "colored entrance" on the Seventh Avenue side (R. 61). The white entrance was accessible to the sidewalk (R. 61), and there was nothing between the sidewalk and the white entrance to prevent petitioner from entering the church at that entrance (R. 62). The statement on page 4 of petitioner's brief that the white entrance was "surrounded by grass and weeds" and that "there appears to have been no light nearby" is not supported by the record. The only reference to grass and weeds is a question propounded by petitioner's counsel as follows:

"Q. Isn't it a fact there was weeds and grass about that time?"

A. I imagine there was." (R. 64).

Counsel for petitioner asked the same witness whether there was a light at the white entrance (R. 63), and the witness answered:

"A. I am not sure, there could have been, since I am not sure." (R. 65).

A street light was located on the corner by the church (R. 32, 33), which is clearly visible in the photograph of the church (R. 37, 38), and this street light appears to be about equidistant from the two entrances (R. 37, 38).

There is nothing on page 34 of the record to substantiate the statement on page 4 of petitioner's brief that the colored entrance was "adequately lighted by lights from the interior of the building." On page 33 of the record it appears that there was a light inside the church but none on the porch at the colored entrance (R. 33). The light shone from inside the building onto the porch but there is no evidence as to the "adequacy" of the light (R. 33).

When petitioner arrived at the church he got out of a taxi at the corner and engaged in conversation with a group who were there to greet him (R. 176). As petitioner was leaving the group some one told him that he was approaching the colored entrance (R. 180, 186). Petitioner testified that he then decided to "*test the ordinance*" and he proceeded to walk toward the colored entrance (R. 186, 187).

The evidence shows without dispute that W. W. Casey, a police officer of the City of Birmingham, in police uniform with cap and badge and on duty at the time, was standing at the colored entrance as petitioner approached that entrance (R. 29, 32, 70, 102). The petitioner testified that Officer Casey was in uniform and that "I was well aware he was a police officer" (R. 190).

What occurred at the door of the church is of vital importance in this case and we will state somewhat in detail what happened there.

Officer Casey testified that he was standing at the door at the colored entrance as petitioner started walking up the sidewalk toward the entrance (R. 30). Officer Casey continued his testimony as follows: (R. 30).

Q: As he (petitioner) left the group out there with whom he had the conversation, what did he do?

A: He walked towards me, when he got three or four feet of me I told him this is the colored entrance and the white entrance is around on the side and that he would have to use that entrance.

Q: What did he do?

A: He didn't do anything, continued walking, didn't say anything. He got up to me and I repeated it to him and he says I will use this entrance, when he did I stepped over in front of the door, and he knocked me back against the wall. (R. 30).

Officer Casey's testimony continues: (R. 31).

Q: Now you said he knocked you back against the wall, tell you in what manner he knocked yoy back or struck you, whatever he did?

A: He lowered his right shoulder and hit me, around my—I guess my chest and pushed me back a couple of steps.

Q: He knocked you back a couple of steps?

A: Yes, sir, then he went back some two or three steps and I braced myself and he come at me again and we went together. We were tus-ling around there and I believe that detective Darnell came up about then.

Q: He lowered his shoulder and struck you some where around your chest and knocked you back?

A: Yes, sir.

Q: Did you hit against anything?

A: No, I went back a couple of steps.

Q: You went back a couple of steps?

A: Yes, sir.

Q: You said he hit you again?

A: He came at me again, I was braced for him that time.

Q: What did you do the second time he struck you?

A: Well, he just kind of hit me and shoved me around, you know, and about that time detective Darnell came up on there with me, and we got off on the ground, I don't know how he got off on the ground. We started towards the sidewalk. (R. 32).

Officer Casey also testified that when the petitioner lowered his shoulder and knocked him back he (Casey) was standing *"directly in the center of the doorway"* (R. 33). On cross-examination Officer Casey repeated in detail and by demonstration how he was knocked backward by the petitioner (R. 45).

The testimony of all of the witnesses to the incident corroborates Officer Casey in all respects. Mr. Gene Wortsman, a reporter for the Birmingham Post, a daily newspaper, saw the incident and he testified that the petitioner knocked Officer Casey back against the doorway, "then they separated and went together again" (R. 68, 69). He also heard Officer Casey speak to the defendant before the defendant hit him (R. 67).

Mr. Roland W. Dopson, reporter for the United Press, also corrobrated the testimony of Officer Casey. He testified that Officer Casey was standing in front of the door (R. 80), and that the petitioner "lowered his shoulder and hit Officer Casey along in the chest somewhere, and knocked Officer Casey back a step or two * * *" (R. 78). *He also testified that prior to the time the petitioner's shoulder came in contact with Officer Casey, Officer Casey had not made any move or step towards the petitioner* (R. 78).

Mr. Leroy Simms, correspondent for the Associated Press in Birmingham, also heard Officer Casey tell the petitioner that "this is the negro entrance, the white entrance is on the side" (R. 93). He testified that the petitioner then *pushed into Casey with his shoulder* (R. 94). Casey stepped back about one step and the petitioner halted, then pushed into Casey the second time with his shoulder (R. 94). Mr. Simms further testified that he saw no mistreatment of the petitioner by the officers and no officer struck the petitioner and no officer used profanity (R. 95, 96).

Three other witnesses corrobrated the testimony of Officer Casey in all respects (R. 106, 134, 143).

The petitioner did not deny that the incident with Officer Casey happened in the manner detailed by all the other witnesses. He testified that Officer Casey told him he was at the colored entrance and would have to go to the side to the white entrance (R. 176). The petitioner testified that he then stated to Officer Casey, *"I am not particular about those things and I started to walk in"* (R. 176). The petitioner testified that he proceeded to walk in and tried to *"scrape by"* Casey, and that he tried a second time to go in (R. 176). The petitioner admitted that he used profane language (R. 177). A most important admission came from the petitioner after he had been questioned at length on cross-examination about his difficulty with Officer Casey; the petitioner stated:

> "I wouldn't dispute any of these other witnesses" (R. 184).

Only the petitioner and the other witnesses mentioned hereinabove testified with reference to the incident at the church door and the facts as related by Officer Casey are virtually undisputed.

After being struck twice by petitioner at the door Officer Casey grabbed petitioner around the waist and pinned him arms to his side (R. 78). Other police officers then came to the assistance of Officer Casey and petitioner was escorted from the porch toward the street (R. 69). As petitioner and the police officers walked across the yard they tripped over a strand of barbed wire and fell to the ground (R. 32). As petitioner rose to his feet he said, "You Son of a Bitches can't do this to me." (R. 107). Other witnesses related that he said, "Goddam Son of Bitches," or variations thereof (R. 32, 79, 95, 144).

Petitioner had his fist drawn back as if to strike, until police Officer McMahan laid his hand on petitioner's shoulder and told him that he was under arrest and had better come along peacefully (R. 144).

Officer McMahan then walked with petitioner to a police automobile (R. 144). Petitioner seated himself on the rear seat of the automobile (R. 145).

Officer McMahan testified as follows: (R. 145).

Q: He (petitioner) got in the car?

A: He got in the rear and set down as I told him to.

Q. Did he say anything further at that time?

A. Yes, he was talking very loud and he—I told him—I says buddy you better be *quite,* you are under arrest, you are going to start something we can't stop, the feeling of the negro here is running high.

Q. What did he say to that?

A. He reported, I don't give a goddam who hears me, I ask—

Q. What did you do then?

A. I ask Sarge-nt Moore at that time to take him away before something happened. (R. 145).

Petitioner was then taken to the city jail in the police automobile (R. 146), where he made an appearance bond and was released (R. 190).

The Trial Judge in the Circuit Court made it clear to the jury and to counsel that petitioner was not being tried for the violation of any segregation law, but was being tried upon the three charges contained in the complaint, viz, (1) disorderly conduct, (2) assault and battery, and (3) resisting an officer in the performance of his duty (R. 166, 174, 192). The jury returned a verdict of guilty on the disorderly conduct charge (R. 22, 23).

The Court of Appeals in its opinion (R. 201) points out that there is nothing in the record to support petitioner's contention that the police arrested petitioner in order to enforce the segregation ordinance (R. 206), nor that the police were attempting to prevent petitioner from making a speech (R. 206). The Court of Appeals further stated that the police did not use force to prevent petitioner's

entry to the Tabernacle, but that petitioner unjustifiably resorted to force (R. 208). The Court of Appeals also said:

> "There was no attempt to arrest the appellant until *after* he had assaulted the police officer by bumping into him and knocking him back a couple of steps against the wall. If this was appellant's idea of "testing" the segregation ordinance it was a method not available to him." (R. 206, 207).

On page 7 of petitioner's brief it is stated that it is clear from the opinion of the Court of Appeals that in the Court's view neither petitioner's use of profanity nor his alleged "struggles" with the police in the churchyard were considered by the Court as elements of the offense for which petitioner was convicted. We find nothing in the opinion of the Court of Appeals indicating such a view by the Court. On the contrary the Court of Appeals in its opinion specifically refers to the profanity used by petitioner after he tripped over the wire (R. 205), and also the fact that petitioner drew his fist back at the time he used such profanity (R. 205). The Court further refers to the continuing struggle of petitioner with police officers in the churchyard (R. 205), and to petitioner's use of profanity in the police automobile when admonished to keep quite (R. 205). We find no intimation that the Court of Appeals did not consider these as elements of the offense of disorderly conduct.

SUMMARY OF THE ARGUMENT

1. This record presents a simple case of assault and battery by petitioner upon a police officer, the use of profanity by petitioner, and conduct and profanity by petitioner in a police automobile tending to a breach of the peace, all embraced within a charge of disorderly conduct. The de-

cision of the State Court rests upon a completely non-federal ground. It appears clearly from the opinion of the State Court and the record that the police officer had made no move toward petitioner and had in no way attempted to place petitioner under arrest prior to the assault and battery committed by petitioner upon the police officer. The opinion of the State Court and the record show that there is no federal question involvel in this case. This Honorable Court should refuse to take jurisdiction and should deny the writ.

2. Petitioner cannot justify his assault and battery upon the police officer even if it be assumed, for purposes of argument, that petitioner had a legal right to enter the church through the entrance at which the police officer stood. Such unlawful method of testing or asserting a right is unknown to the law. It is a universal rule of law that a person cannot lawfully commit an assault and battery or create a breach of the peace amounting to disorderly conduct in order to "test" his legal rights.

3. If petitioner desired to "test" the constitutionality of the segregation ordinance, as he testified, he had several legal and non-violent methods he might have pursued, none of which involved assault and battery or breach of the peace. A civil suit for damages under Title 8, U. S. Code, Section 43, was available to petitioner as a means of testing the ordinance. Also, a bill for an injunction against the enforcement of the ordinance might have been filed. A criminal prosecution under Title 18, U. S. Code, Section 52, would also afford a means of testing the ordinance. These means of "testing the ordinance" are mentioned because petitioner in his brief advances the strange theory that petitioner had to use force against the police officer in order to "vindicate what he believed to be his constitutional rights" and to "test the ordinance."

ARGUMENT

I

THIS RECORD PRESENTS A SIMPLE CASE OF ASSAULT AND BATTERY BY PETITIONER UPON A POLICE OFFICER, THE USE OF PROFANITY BY PETITIONER, AND CONDUCT AND PROFANITY BY PETITIONER IN A POLICE AUTOMOBILE TENDING TO A BREACH OF THE PEACE, ALL EMBRACED WITHIN A CHARGE OF DISORDERLY CONDUCT. THE DECISION OF THE STATE COURT RESTS UPON A COMPLETELY NON-FEDERAL GROUND AND THIS HONORABLE COURT SHOULD REFUSE TO TAKE JURISDICTION AND SHOULD DENY THE WRIT.

As set forth in the opinion of the Court of Appeals of Alabama (R. 201) the arrest, prosecution and conviction of petitioner arose out of petitioner's assault and battery upon a police officer of the City of Birmingham, and petitoner's subsequent use of profanity and menacing gestures. Much of petitioner's brief is devoted to a characterization of petitioner's arrest as an attempt to enforce the segreation ordinance of the City of Birmingham. The opinion of the Court of Appeals disposes of this contention of petitioner by referring to the undisputed fact that "there was no attempt to arrest the appellant (petitioner) until after he had assaulted the police officer by bumping into him and knocking him back a couple of steps against the wall" (R. 206, 207). Mr. Roland W. Dopson, a reporter for the United Press, and a completely disinterested witness, testified that prior to the time the petitioner's shoulder came in contact with Officer Casey, Officer Casey had not made any move or step toward the petitioner (R. 78). And petitioner was not told that he was under arrest prior to that time for on page 5 of petitioner's brief it is stated that pe-

titioner was informed for the first time that he had been arrested only after petitioner had tripped over the wire in the churchyard (R. 144). Petitioner seems to complain of the fact that after petitioner had assaulted Officer Casey twice and other police officers had come to the aid of Officer Casey and had commenced to escort petitioner toward the sidewalk petitioner was not immediately informed that he was under arrest or informed of the nature of the charge. The assault and battery was committed in the presence of the several police officers and an officer may arrest any person without a warrant, on any day and at any time, for any public offense committed, or breach of the peace threatened in his presence. Sections 154, 155, Title 15, Code of Alabama 1940; *Williams v. State,* 35 So. 2d 564, 33 Ala. App. 304.

A police officer is not under the duty to inform the person arrested for an offense committed in his presence of the nature of the charge.

Section 155, Title 15, Code of Alabama 1940.
Lakey v. State, 24 Ala. App. 273, 134 So. 455.
Rutledge v. Rowland, 161 Ala. 114, 49 So. 461.

Also, when the official capacity of the arresting officer is known to the person arrested a statement of the officer's authority is not required.

Williams v. State, 33 Ala. App. 304, 35 So. 2d 564.
Sanderson v. State, 168 Ala. 109, 53 So. 109.

And petitioner, in reference to Officer Casey, said:

"Yes, he had some part of his uniform, I was well aware he was a police officer." (R. 190).

Petitioner's brief refers to cases holding that a person may use reasonable force in resisting an unlawful arrest. Such cases are inapposite here. When petitioner assaulted Officer Casey twice Officer Casey had made no move or

step toward petitioner (R. 78), and had not told petitioner he was under arrest (Petitioner's Brief page 5). No arrest, lawful or unlawful, had been made or attempted by Officer Casey or any other officer prior to petitioner's assault and battery on Officer Casey (R. 78). The applicable rule of law is that stated in *Harris v. State*, 95 S. E. 268, 21 Ga. App. 792, as follows:

> "The officer must, by some physical attempt, endeavor to make the unlawful arrest before the other person can unlawfully strike him or otherwise resist him by the use of physical force."

See also *People v. Tepperman*, 273 NYS 690, 151 Misc. 810. This rule is stated at 6 C. J. S., page 949, Assault and Battery; also at 27 C. J. S., page 286, Disorderly Conduct.

In addition to the assault and battery committed upon Officer Casey, petitioner was guilty of other conduct proscribed by the disorderly conduct ordinance. Section 311 of the 1944 Code of City of Birmingham (Appendix). After tripping over a wire in the churchyard, petitioner began using profanity directed at the police officers (R. 32, 79, 95, 107, 144). Petitioner also had his fist drawn back as if to strike (R. 144). When seated in the police automobile petitioner was talking loud and Officer McMahan asked him to be quiet (R. 145). Officer McMahan told petitioner that he might start something the police could not stop, as feelings "were running high" (R. 145). In this tense situation petitioner's reply was:

"I don't give a goddam who hears me" (R. 145).

All of this was properly considered by the court and jury in determining whether petitioner was guilty of disorderly conduct.

It is clear from the opinion of the Court of Appeals (R. 201) that this case was rightly decided on non-federal grounds.

This Honorable Court has adhered to the rule that it will not review a state court decision resting on an adequate and independent non-federal ground. *Lynch v. New York, ex rel. Pierson,* 55 S. Ct. 16, 293 U. S. 52, 79 L.ed 191; *Radio Station WOW, Inc. v. Johnson,* 65 S. Ct. 1475, 326 U. S. 120, 89 L.ed. 2092; *Winkler v. Maryland,* 69 A. 2d 674, cert. denied March 27, 1950, 70 S. Ct. 621, 94 L.ed 505.

We respectfully submit that the application of such rule to the instant case will result in a denial of the writ. This Honorable Court may, of course, look to the record to determine whether the State Court has evaded any federal question. We invite such an inspection of the record in this case for we are confident that it will serve to emphasize the point that petitioner was prosecuted and convicted of an offense wholly disassociated from any federal constitutional implication.

II

PETITIONER CANNOT JUSTIFY HIS ASSAULT AND BATTERY UPON OFFICER CASEY EVEN IF IT BE ASSUMED THAT PETITIONER HAD A LEGAL RIGHT TO ENTER THE CHURCH THROUGH THE ENTRANCE IN WHICH OFFICER CASEY STOOD. SUCH UNLAWFUL METHOD OF TESTING OR ASSERTING A RIGHT IS UNKNOWN TO THE LAW.

This principle has been enunciated in cases involving various situations. In *State v. Bradbury,* 74 P. 231 (Supreme Court of Kansas), the defendant had been wrongfully deprived of the possession of his real property by plaintiff. In his efforts to regain possession defendant committed an assault upon plaintiff. In holding defendant guilty of assault and battery the court said:

> "While one rightfully in possession of property may defend his possession against an attack, and while one

lawfully entitled to the possession of real property may, if he can, enter and take peaceable possession, yet, no matter what lawful right to possession one out of the actual possession of real property may have, he will not be justified in making a forcible entry and committing a breach of the peace in ejecting by force an actual occupant. *Such unlawful method of testing a legal right is unknown to the law.*" (Emphasis added).

And we remind this Honorable Court that petitioner testified that when he walked toward the entrance where Officer Casey stood, and where petitioner later assaulted Officer Casey, petitioner "only wanted to test the ordinance" (R. 186, 187).

In *Sabre v. Mott,* 88 Fed. 780, the owner of an item of personal property, a written contract, committed an assault and battery upon a person who wrongfully withheld possession from him. In sustaining a judgment against the owner of the contract the court quoted from Blackstone's Commentaries (3 Blackstone's Commentaries, 4) as to the right of an owner to re-take personal property as follows:

"If, therefore, he can so contrive as to gain possession of his property again, without force or terror, the law favors and will justify his proceeding." But the right should never be exerted "where such exertion must occasion strife and bodily contention, or endanger the peace of society."

The court said further:

"So, no right to the contract, however absolute, would justify taking it by force from the plaintiff's person and much less would it justify any assault upon his person to compel delivery of it; and there was no question about the ownership of the paper, or the amount of force necessary to retake it, to submit to the jury, upon the evidence, as decisive for the defendant of the justification set up."

The decisions of this Honorable Court have recognized and applied this rule of law. In *Denver & R. G. Ry. Co. v. Harris*, 7 S. Ct. 1286, 122 U. S. 597, 30 L.ed. 1147, it was held that regardless of the title or right to possession violence and force constituting a breach of the peace could not lawfully be employed in an effort to regain possession. To like effect is *Iron Mountain and Helena Railroad Company v. Johnson*, 7 S. Ct. 339, 119 U. S. 608, 30 L.ed 504.

The same rule has been recognized in cases involving personal rights as distinguished from attempted recoveries of real or personal property. In 27 C. J. S. at page 286, Disorderly Conduct, it is stated:

> "One protesting against a policeman's unlawful action, however, must do it in such a way as not to create a public disturbance amounting to disorderly conduct."

Several cases illustrate the application of this rule. In *Commonwealth v. Cooper*, 95 Pa. Super. 382, police officers entered a hall for the purpose of forbidding a meeting being held there. Following the entry of the police a disturbance occurred and certain persons were charged with disorderly conduct. The court sustained the conviction and stated as follows:

> "Assuming, without deciding, that the action of the police in entering the hall and forbidding the meeting, before there was any actual disturbance or imminent breach of the peace, was illegal, it was not the immediate cause of the demonstration which disturbed the peace and quiet of the neighborhood and annoyed the traveling public. *That was occasioned by the noisy, boisterous, and disorderly conduct of these appellants following the action of the police. The illegal action of the police, assuming it was illegal, furnished no justification or excuse for a disorderly demonstration such as these appellants resorted to.* There was a legal and orderly way of determining the legality of the police's action; but these appellants wanted none of it. They were apparently de-

sirous of the outcome which resulted. They secured the crowd which otherwise they would not have had, and obtained the arrests for which they were clamoring. While they had a right to protest against the unwarranted action of the police, they could not do so in such a manner as to make themselves disturbers of the peace and good order of the neighborhood. The cause of their protest against the police will not excuse or condone the disorderliness of their subsequent conduct and consequent annoyance to the neighborhood and the traveling public. *One may protest against the actions of a policeman who unwarrantedly tells him to "move on", but he must do it in such a way as not to create a public disturbance or amount to disorderly conduct.*" (Emphasis added).

A similar case to that of Commonwealth v. Gadson, 67 Pa. Super. 459. In this case a detail of police officers was assigned to prevent any person under the age of twenty-one years attending a particular meeting. The police officers refused to permit a girl who appeared to be under 21 to enter the hall. A disturbance resulted and the charge of disorderly conduct was filed. The Court sustained the conviction, and in its opinion the Court said as follows:

"Although the action of the police in forbidding those under twenty-one years of age to attend the meeting may have been illegal, it was not the immediate cause of the arrest of these two defendants. This was brought about as a result of their own actions which led to the disturbance. There were loud, boisterous and unseemly noises sufficient to disturb the public peace. The action of the police was no justification or excuse for the disorder which took place. Instead of complying with the request of the police officers, they saw fit to protest in a way which only led to trouble."

o o o

"In Com. V. Cooper, et al. 95 Pa. Superior Ct. 502, we had a case similar in principle to this one except that in the case cited permission for the meeting had been refused and the disorder was considerably more excessive. We need not repeat at length what was there said as the

effect that the justice of a protest against unwarranted orders and actions of policemen cannot justify a public disturbance or disorderly conduct upon the part of the protestants. Fair-minded persons might well differ about the conclusions to be drawn from the evidence in this record against appellant but we cannot say there was no evidence to support his conviction." (Emphasis added).

To the same effect is the case of *People v. Sadowski*, 267 N. Y. S. 762, 149 Misc. 583, and also the case of *People v. Tepperman*, 273 N. Y. S. 690, 151 Misc. 810.

III

IF PETITIONER DESIRED TO "TEST" THE CONSTITUTIONALITY OF THE SEGREGATION ORDINANCE, AS HE TESTIFIED, HE HAD SEVERAL LEGAL AND NON-VIOLENT METHODS HE MIGHT HAVE PURSUED, NONE OF WHICH INVOLVED ASSAULT AND BATTERY OR BREACH OF THE PEACE.

As we understand petitioner's brief it virtually admits that petitioner used force against Officer Casey in attempting to enter the church. On page 5 of petitioner's brief it is stated that "the petitioner did not deny that he resisted the attempt to prevent him from entering the Tabernacle through the front door, * * *." When viewed in the light of the undisputed evidence as to what occurred at the Tabernacle entrance, as set forth in "Statement of the Case," it is obvious that the word "resisted," as used in petitioner's brief, can mean only that petitioner aggressively charged into Officer Casey in an effort to knock Officer Casey out of the way and thereby to gain forcible entry to the Tabernacle. (R. 30, 31, 68, 69, 78, 79, 94, 105, 134, 145, 176).

Again, the footnote on page 18 of petitioner's brief refers to the remark by the Court of Appeals that if bumping into Casey "was appellant's idea of 'testing' the ordinance, it

was a method not available to him" (R. 206). This observation is then made in the footnote:

> "The Court does not indicate why the time honored method of testing the constitutionality of a law by violating it was not available to petitioner. Nor does it suggest any other method. Indeed, there was none. *Petitioner was confronted with the choice of attempting to enter the church over Casey's opposition or abandoning the effort to vindicate what he believed to be his constitutional rights.*" (Emphasis added).

And on page 27 of petitioner's brief:

> "As we have already shown the threatened or actual breach of the peace, if any, was not occasioned by petitioner, but by the illegal action of the police in barring his entry into the Tabernacle. *Had they permitted petitioner to enter unhindered, and then arrested him for violating the ordinance, no breach of the peace would have occurred.*" (Emphasis added).

We refer to these excerpts from petitioner's brief to show that, aside from the evidence, the attitude expressed in petitioner's brief seems to be that the assault and battery committed by petitioner upon Officer Casey, or the breach of the peace occurring at the church entrance, was necessary if petitioner were to "test" the segregation ordinance.

It would certainly be a dangerous precedent for any court to recognize as lawful the commission of an assault and battery to test or assert a legal right.

If petitioner was of the opinion that Officer Casey's presence in the doorway of the church was for the purpose of enforcing the segregation ordinance and petitioner felt impelled "to test the ordinance" as he testified (R. 186, 187), there were several legal and non-violent methods available, none of which involved the extra-legal process of committing an assault and battery or creating a breach of the peace.

Title 8, U. S. Code, Section 43, gives a right of action against any person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory,

subjects, or cause to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privilege or immunities secured by the constitution and laws; this right of action includes action at law, suit in equity, or other proper proceeding for redress. This section gives a right of action sounding in tort and the jury may award exemplary or punitive damages. *Hague v. Committee for Industrial Organization*, 101 Fed. 2d 774, 59 S. Ct. 954, 307 U. S. 496, 83 L.ed 1423. If petitioner felt that Officer Casey had deprived him of constitutional rights, privileges, or immunities when Officer Casey told petitioner that he would have to use the white entrance, petitioner could have "tested the ordinance" by means of a civil suit under this section of the U. S. Code.

Or, petitioner could have proceeded in the Federal District Court for an injunction against the enforcement of the ordinance he regarded as unconstitutional. *Hague vs. Committee for Industrial Organization*, 59 S. Ct. 954, 307 U. S. 496, 83 L.ed 1423.

A criminal prosecution under Title 18, Section 52, U. S. Code, for deprivation of constitutional rights or privileges was a third method by which petitioner could have "tested" the ordinance and could have obtained redress, if he were legally entitled to redress.

We mention these legal means of "testing the ordinance" only because petitioner in his brief has advanced the strange theory that petitioner had to use force against Officer Casey in order to "vindicate what he believed to be his constitutional rights" (petitioner's brief, page 18) and to "test the ordinance" (R. 186, 187). We respectfully submit that any recognition of the right of a citizen to resort to force, assault and battery, and breach of the peace to vindicate what he considers to be his rights would lead to a state of anarchy. Orderly process of law and the courts have been provided for the vindication of such rights.

CONCLUSION

We respectfully submit that the opinion of the Court of Appeals of Alabama and the record show clearly that petitioner was prosecuted and convicted of disorderly conduct for assaulting a police officer and for using profanity and making threatening gestures. It is clear that the State Courts have not evaded any constitutional issues. The opinion and record show conclusively that petitioner's arrest, prosecution and conviction for disorderly conduct was not in fact or in form an effort to enforce a segregation ordinance.

Even if it be assumed, for purposes of argument, that petitioner had a legal right to enter at the door where Officer Casey stood, petitioner had no legal right to force an entrance by assaulting Officer Casey.

We respectfully submit that this Honorable Court should deny the petition for writ of certiorari as no federal question is involved in this case.

Respectfully submitted,

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APPENDIX

General City Code of Birmingham

Disorderly Conduct Ordinance

Section 311.

Any person who disturbs the peace of others by violent or offensive conduct, or carriage, or by loud or unusual noises, or by profane or obscene or offensive language, or any person who shall commit any act or diversion causing or tending to a breach of the peace, or any person who shall be guilty of lewd, immoral or indecent conduct, or any person who shall use any obscene or filthy language in a public place, or any person who shall commit any act or diversion tending to or calculated to debauch the morals of any person, shall be deemed guilty of disorderly conduct, and, upon conviction, shall be punished as provided in section 4 of this code.

Section 4.

Any person who shall fail or neglect to perform any duty imposed by this code, or who shall fail or neglect to do or perform any act or series of acts required to be done or performed by this code, or who shall fail or neglect to perform any duty, act or series of acts, the neglect or failure of performance of which is declared unlawful or made punishable by this code, or who shall do or perform any act or series of acts which is prohibited, made unlawful or made a misdemeanor by this code, or who shall violate any provision of this code, shall, upon conviction therefor, be punished by a fine not exceeding one hundred dollars or by imprisonment in the city jail, workhouse or house of correction or at hard labor upon the streets or public works for not exceeding six months, or by both such fine and im-

prisonment; and, in the event the fine costs are not presently paid the defendant shall be required to work out the fine and costs under the direction of the city authorities, allowing one dollar for each day's service. No female shall be required to work on the streets of the city. The penalties provided in this section shall apply in all cases other than offenses for which a different penalty is specifically prescribed; provided, that the provisions of this section shall not apply to violations of official duty imposed by this code upon officers or employees of the city as such, unless the provision imposing the duty also expressly makes the violation thereof unlawful or punishable.